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Filing date: **10/10/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91182064
Party	Plaintiff AS Holdings, Inc.
Correspondence Address	Terence J. Linn Van Dyke, Gardner, Linn & Burkhart, LLP. 2851 Charlevoix Drive SE, Ste 207 Grand Rapids, MI 49546 UNITED STATES linn@vglb.com, anne@vglb.com
Submission	Reply in Support of Motion
Filer's Name	Terence J. Linn
Filer's e-mail	linn@vglb.com, anne@vglb.com
Signature	/Terence J. Linn/
Date	10/10/2008
Attachments	Opposer's Reply Brief in Support of Request for Correction of Order.pdf (7 pages)(262582 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AS HOLDINGS, INC.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91182064
)	
H&C MILCOR, INC. f/k/a)	
AQUATICO OF TEXAS, INC.)	Serial Number: 76/461,157
)	Mark: Miscellaneous Design:
Applicant.)	(Pipe Boot Product Design)
)	

**OPPOSER'S REPLY BRIEF IN SUPPORT OF REQUEST FOR CORRECTION OF
ORDER EXTENDING SCHEDULED DATES**

Applicant's effort to capitalize on a computer-generated error in the scheduling of dates in this action is improper. As originally scheduled in this Opposition proceeding, expert disclosures were due August 31, 2008. (Scheduling Order dated January 24, 2008.) The August 31, 2008 date passed without Applicant making any disclosures of experts in this proceeding. As detailed herein, there was no stipulation to extend the period for expert disclosures and no motion was filed pursuant to 37 CFR §2.120(a)(2) requesting an extension of that date. The erroneous identification of a subsequent expert disclosure date was due to a computer-generated schedule for which no extension of that date was requested. Applicant's counsel was well aware of this erroneous date change, yet apparently hopes to capitalize on a computer-generated error.

As reflected in papers filed by Applicant, on August 26, 2008, Opposer served a Notice of Deposition on Applicant seeking a deposition prior to the close of discovery. (Applicant's Motion to Extend the Discovery Period under 37 CFR 2.127, page 3 (mailed September 24, 2008)). Notwithstanding numerous communications between counsel, prior to September 24, 2008 Applicant's counsel never provided to Opposer's counsel an available date for that properly

noticed deposition. Opposer's counsel repeatedly represented to counsel for Applicant that when Applicant provided available dates for that deposition, Opposer would consent to an extension of the discovery period. (See Applicant's Motion to Extend the Discovery Period under 37 CFR 2.127, page 4.)

On September 24, 2008 Applicant's counsel provided available dates for the Rule 30(b)(6) deposition of Applicant, and on that same day Applicant filed by mail Applicant's Motion to Extend the Discovery Period under 37 C.F.R. 2.127. That motion by Applicant did not request or even mention an extension of the deadline for service of expert disclosures. In a telephone conference between counsel on September 25, Opposer selected one of the offered dates for the deposition, and agreed to a sixty-day extension of the close of discovery. No agreement for an extension relating to expert disclosures was entered into or even discussed.

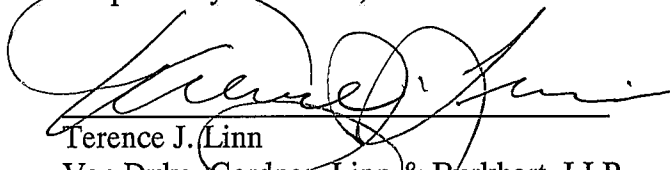
On Monday, September 29, the day prior to close of discovery and prior to Opposer being allowed to depose Applicant, Opposer determined that Applicant's motion for extension of discovery had still not been logged into the TTAB website. (See email attached as Exhibit A.) Subsequent to sending an email, on September 29, undersigned Counsel for Opposer, Terence J. Linn, conferred by telephone with Applicant's counsel, Dillis V. Allen, and agreed to filing of a motion for 60-day extension of the discovery period via the Patent and Trademark Office electronic filing system. Although during that conference Opposer's counsel Mr. Linn suggested that Applicant's counsel Mr. Allen could file the extension motion via the electronic filing system, Mr. Allen agreed that Mr. Linn should file that motion since Mr. Allen was not conversant with the electronic filing system. At no time during that conference was there discussion or agreement to extension of the previously expired expert disclosure date.

The deposition of Applicant pursuant to Rule 30(b)(6) was conducted on Friday, October 3, 2008, at the facilities of Applicant. On October 3, 2008, counsel for the parties, the undersigned counsel for Opposer Terence J. Linn and counsel for Applicant Dillis V. Allen, conferred in person and discussed the subject motion of Opposer to correct the scheduling order, of which Mr. Allen was aware and had been served. In those discussions Opposer's counsel Mr. Linn explained to Applicant's counsel Mr. Allen that Opposer had not intentionally requested an extension of the expert date, but that upon entering the requested motion for extension of the discovery period the currently scheduled dates were automatically generated by the computer system, which necessitated the filing of the present motion to correct. Mr. Linn affirmatively represented that Opposer had not requested a belated extension of the expert disclosure date and that it was a computer generated error that Opposer expected the Trademark Trial and Appeal Board would correct. Applicant's counsel was well aware that the rescheduling of the expert disclosure date was erroneous and neither requested nor agreed to by Opposer. At no time during that discussion or during the course of that day did Applicant's counsel inform Opposer's counsel that Applicant was serving a Notice of Expert Witnesses. At no time during that discussion or during the course of that day did Applicant request that the expert disclosure date be extended.

Opposer has been diligently attempting to prosecute this Opposition proceeding and has been doing so under the understanding that Applicant would not have an expert(s) since the deadline for expert disclosures passed without such disclosures by Applicant. Applicant's unsubstantiated statement of undefined "prejudice" does not overcome the prejudice that Opposer will incur if Applicant is allowed to capitalize on what is nothing more than a computer generated scheduling error.

The amended scheduling order should be corrected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terence J. Linn", is written over a horizontal line. The signature is stylized with large, sweeping loops.

Dated: October 10, 2008

Terence J. Linn
Van Dyke, Gardner, Linn & Burkhart, LLP
2851 Charlevoix Drive SE, Suite 207
Grand Rapids, MI 49546
(616) 975-5500
Attorney for Opposer

Terry Linn

From: Terry Linn
Sent: Monday, September 29, 2008 12:48 PM
To: 'vicvardon@sbcglobal.net'
Cc: Matthew Kendall
Subject: RE: Alpha v. Milcor Deposition Scheduling

Dillis:

(1) I take this to be a confirmation that the deposition is on for this Friday. Let me know the conference room location. I have to inform the reporter. We can do this at Portals Plus if you want.

(2) We can start later if we can run later should it be necessary. Let me know when you want to start.

(3) Finally, the PTO website still does not list your motion for 60 day extension of dates. As I told you last week, we agree to the 60 day extension. The PTO will likely take a couple weeks to get to the motion since it was mailed rather than sent via email. In order to get a ruling by the PTO in the next day or so, I will file the motion for a 60 day extension of discovery and subsequent dates, and indicate you consented to the motion. In this way hopefully we will have an order by the end of today granting the extension. Let me know if you do not agree.

Terry

Terence J. Linn

Van Dyke, Gardner, Linn & Burkhart, LLP
Suite 207
2851 Charlevoix Drive, S.E.
Grand Rapids, MI 49546
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From: DILLIS ALLEN [mailto:vicvardon@sbcglobal.net]
Sent: Monday, September 29, 2008 11:23 AM
To: Terry Linn
Subject: Re: Alpha v. Milcor Deposition Scheduling

terry my office is too small. i will check a conf room in my building. otherwise we can find a room at portals plus. can we start later i have therapy on friday morning.

dillis

--- On Thu, 9/25/08, Terry Linn <Linn@vglb.com> wrote:

From: Terry Linn <Linn@vglb.com>
Subject: Alpha v. Milcor Deposition Scheduling
To: vicvardon@sbcglobal.net

9/29/2008

EXHIBIT A

Cc: "Matthew Kendall" <Kendall@vglb.com>

Date: Thursday, September 25, 2008, 3:29 PM

Mr. Allen:

As we discussed yesterday, the available dates for deposition of Milcor are October 3, 9 and 16.

We will conduct the deposition of Milcor on October 3. We are making arrangements for the court reporter.

Please confirm that your office is available for conducting that deposition and that we will not have to secure a conference room at another location.

Terry

Terence J. Linn

Van Dyke, Gardner, Linn & Burkhardt, LLP

Suite 207

2851 Charlevoix Drive, S.E.

Grand Rapids, MI 49546

Phone: (616) 975-5503

Fax: (616) 975-5505

e-mail: linn@vglb.com

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9/29/2008

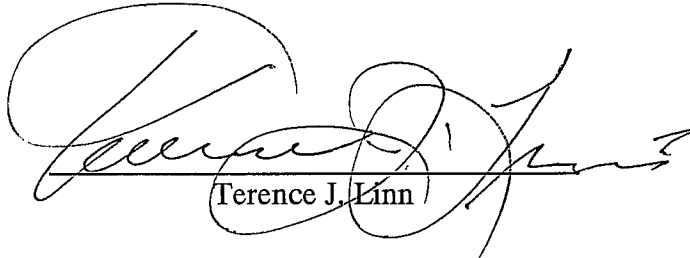
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Applicant.)	(Pipe Boot Product Design)
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, a true and correct copy of Opposer's Reply Brief in Support of Request for Correction of Order Extending Scheduled Dates was sent via First Class Mail, postage prepaid to Attorney for Applicant as follows:

Dillis V. Allen
105 S Roselle Rd, Suite 101
Schaumburg, IL 60193


Terence J. Linn